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Briefing note

International Regulatory Update

19 - 23 September 2016

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Prospectuses: EU Parliament adopts amendments to proposed regulation

The EU Parliament has adopted a set of amendments to the Commission's proposal for a regulation on the prospectus to be published when securities are offered to the public or admitted to trading. The main amendments adopted by the EU Parliament include:

- reducing the scope of the regulation so that it does not apply to offers of securities to fewer than 350 persons per Member State and to a total of no more than 4,000 persons in the EU (other than certain investors), or to offers with a total consideration in the EU below EUR 1 million, calculated over a period of 12 months;
- including an optional exemption for offers that do not exceed EUR 5 million, calculated over a period of 12 months;
- allowing, in exceptional circumstances, an issuer to produce a longer summary of up to 10 sides of A4-sized paper when printed (instead of six) where the complexity of the issuer's activities so requires; and
- the introduction of the concept of an EU growth prospectus for the proportionate disclosure regime set out in Article 15. Such prospectuses will have reduced content requirements and be in a standardised format.

The proposal has been referred back to the Parliament's ECON Committee for further deliberation.

MiFIR: ESMA consults on trading obligation for derivatives

The European Securities and Markets Authority (ESMA) has published a discussion paper on the trading obligation under the Markets in Financial Instruments Regulation (MiFIR). The paper seeks views on ESMA's first proposals on the implementation of the trading obligation for derivatives as set out in Articles 28 and 32 of MiFIR and on ESMA's preliminary analysis of some classes of derivatives that could become subject to the trading obligation.

The trading obligation under MiFIR is linked to the clearing obligation under the European Market Infrastructure Regulation (EMIR). Once a class of derivatives needs to be centrally cleared under EMIR, ESMA must determine whether these derivatives should be traded on venue i.e., a regulated market (RM), multilateral trading facility (MTF), organised trading facility (OTF) or an equivalent third-country trading venue. MiFIR sets out two possible tests to determine the trading obligation: the venue test and the liquidity test.

The discussion paper sets out options on how to determine the trading obligation by applying both tests, including an initial liquidity assessment on the basis of trading data for the six months to end-2015.

Comments to the consultation close on 21 November 2016. ESMA will analyse the feedback received to this consultation and aims to publish a consultation paper in the first quarter of 2017. If needed, a draft technical standard is scheduled to be submitted to the EU Commission in the summer of 2017.

EMIR: ESMA adds ICE Clear Europe to list of authorised CCPs

ESMA has added ICE Clear Europe to its list of authorised central counterparties (CCPs) under EMIR. EMIR requires EU-based CCPs to be authorised and non-EU CCPs to be recognised in the EU. Authorised or recognised CCPs can then be used by EU firms to fulfil their clearing obligations.

CRD 4: EBA publishes final draft ITS on exchanges between authorities regarding qualifying holdings

The European Banking Authority (EBA) has published final draft implementing technical standards (ITS) on the procedures, forms and templates that competent authorities in the EU should use when consulting each other on qualifying holdings.

The objective of the draft ITS is to ensure effective and efficient communications between concerned authorities, both on a cross-border basis and across sectors. The ITS set out a streamlined process, which consists of a single notice to send an information request and respond to it, when competent authorities across the EU consult each other on acquisitions and increases of qualifying holdings in credit institutions. The standards also specify the timeframe for submitting the consultation notice and responding to it and provide a set of templates for this purpose.

The EBA has developed the ITS according to the Capital Requirements Directive (CRD 4), which sets out the legal framework for the prudential assessment of acquisitions by natural or legal persons of qualifying holdings in credit institutions and of further increases of such holdings.

Payment accounts: EBA consults on standardisation of fee terminology and disclosure documents

The EBA has launched a consultation on draft technical standards aimed at standardising fee terminology and disclosure documents across Member States under the

Payment Accounts Directive. The draft standards propose to:

- standardise eight terms for services linked to a payment account that are subject to a fee offered by at least one payment service provider (PSP) at national level, and provide consumer-friendly definitions for these terms;
- standardise templates and the common symbol for the pre-contractual fee information document (FID);
- standardise templates and the common symbol for the post-contractual statement of fees (SoF); and
- provide instructions for PSPs on how to fill in the FID and SoF templates.

By increasing the standardisation, and thus comparability, of fees the draft technical standards are intended to make it easier for consumers to compare offers from different PSPs and make informed decisions as to which payment account is most suitable for their needs.

Comments on the consultation are due by 22 December 2016.

PSD2: EBA consults on guidelines on minimum monetary amount of indemnity insurance

The EBA has launched a consultation on guidelines on the criteria to be considered when stipulating the minimum monetary amount of the professional indemnity insurance (PII) or comparable guarantee for payment initiation and account information service providers under the Payment Service Directive (PSD2).

The draft guidelines set out criteria, indicators, calculation methods and a formula competent authorities should use when granting authorisation to undertakings applying for the provision of payment initiation and/or approving the registration of undertakings applying for the provision of account information.

Comments are due by 30 November 2016.

FSB reports on implementation of G20/FSB reforms in non-priority areas

The Financial Stability Board (FSB) has published a note summarising the status of implementation of G20/FSB reforms in areas not designated as a priority under the FSB Coordination Framework for Implementation Monitoring. These are:

- hedge funds (recommendations 1-3);
- securitisation (recommendations 4-6);
- enhancing supervision (recommendations 7-10);
- building and implementing macroprudential frameworks and tools (recommendations 11-12);
- improving oversight of credit rating agencies (recommendations 13-14);
- enhancing and aligning accounting standards (recommendation 15);
- enhancing risk management (recommendations 16-17);
- strengthening deposit insurance (recommendation 18);
- safeguarding the integrity and efficiency of financial markets (recommendations 19-21); and
- enhancing financial consumer protection (recommendation 22).

The findings are based on self-reporting by FSB jurisdictions to the seventh annual Implementation Monitoring Network (IMN) survey as of end-July 2016.

The FSB has also published a chart which summarises the recommendation-wise status of implementation of G20/FSB recommendations across the FSB membership, based on the latest available survey information.

ISDA publishes whitepaper on derivatives processing and market infrastructure

The International Swaps and Derivatives Association (ISDA) has published a whitepaper on the future of derivatives processing and market infrastructure. The paper identifies a number of opportunities for greater standardisation and automation of derivatives trade processes, in order to achieve improved efficiency, reduced complexity and lower costs for market participants.

The paper has been published in response to demand from market participants for new solutions to automate and streamline the significant reporting, trading, clearing and collateral management requirements that have emerged as a result of regulatory changes. It highlights three areas where further standardisation can be achieved: documentation, data and processes. The paper also identifies opportunities to transform ISDA's legal documentation by developing 'smart contracts' that can automatically execute intended lifecycle events.

HMT consults on amending definition of financial advice in Regulated Activities Order

HM Treasury (HMT) has launched a consultation on amending the definition of regulated advice in Article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) following the

recommendations of the Financial Advice Market Review (FAMR). In particular, FAMR found that the definition under MiFID is clearer for firms and consumers, and is simpler for building into compliance processes.

The consultation proposes to amend the wording of Article 53 RAO to reflect the definition under MiFID so that consumers only receive 'regulated advice' when they are offered a personal recommendation for a specific product. HMT believes this is narrower and more specific than the definition currently found in the RAO, which relates to advising on investments. An annex sets out the proposed text of the revised Article 53 RAO.

HMT is seeking views on the potential costs and benefits of the change and any potential risks.

AMF publishes study on barriers to cross-border distribution of investment funds in Europe

Within the framework of the Capital Markets Union (CMU) and the consultation on the cross-border distribution of investment funds launched by the EU Commission in June 2016, the French Autorité des marchés financiers (AMF) has published a study entitled 'Cross-border fund distribution in Europe: identifying the barriers to entry and enhancing investors' confidence'.

While highlighting the success of the passport mechanism in terms of cross-border distribution of investment funds in Europe, the study identifies some barriers to the real cross-border marketing of investment funds, such as distribution networks' preferences for their own products, the necessary adaptation to local consumer profiles, taxation, and consumers' national bias.

The AMF suggests three ways of developing the cross-border provision of investment funds while protecting European consumers:

- promoting open architecture and technologically innovative distribution and marketing methods;
- allowing the local authority (host country authority) to supervise all types of advertising and marketing materials in its territory; and
- starting a debate on the state of market supervision architecture with respect to the European passport, with a view to giving host-country authorities clear and immediate power over service providers targeting investors in their country through the free provisions of services.

MiFID2: CONSOB issues notice on ESMA guidelines on cross-selling practices

The Commissione Nazionale per le Società e la Borsa (CONSOB) has notified ESMA of its intention to comply with ESMA's guidelines on cross-selling by implementing them into the local legal framework in the context of the procedure for the transposition of MiFID2 provisions.

ESMA published its guidelines in December 2015 in order to support the implementation of MiFID2. The relevant Italian version was published on 11 July 2016.

Article 24(11) of MiFID2 introduces specific and detailed provisions in relation to cross-selling activities. It also sets out the procedure whereby ESMA may re-assess market practices on cross-selling activities.

The guidelines also clarify the applicable conduct of business rules and the organisational arrangements that firms must follow or put in place to mitigate the potential damage to investors in the ambit of cross-selling activities.

The guidelines shall apply from 3 January 2018.

BRRD: CNMV adopts EBA guidelines on provision of information in summary or collective form for purposes of Article 84 (3)

The Spanish National Securities Market Commission, the Comisión Nacional del Mercado de Valores (CNMV), has adopted the EBA guidelines on the provision of information in summary or collective form for the purposes of Article 84 (3) of the Bank Recovery and Resolution Directive 2014/59/EU (BRRD).

The guidelines specify that for the purposes of disclosing information in summary or collective form according to Article 84(3) of the BRRD, information should be provided either by means of a brief statement or on an aggregate basis, in anonymised form so that individual institutions or entities cannot be identified.

SGX and ICBC sign MOU to enhance links between Singapore's and China's capital markets

The Singapore Exchange (SGX) and Industrial and Commercial Bank of China Limited (ICBC) have signed a memorandum of understanding (MOU) to collaborate in a range of areas in order to enhance the links between Singapore's and China's capital markets.

Under the MOU, the SGX and ICBC agree to work together to promote Singapore's capital markets and support Chinese companies looking to list equities or bonds on the

SGX, with a focus on real estate investment trusts and offshore Renminbi bonds. This support will include providing guidance on the listing process, listing rules as well as post listing marketing support in both China and Singapore.

The SGX and ICBC will also explore collaboration in derivatives trading, bond trading and market making of RMB denominated contracts listed on the SGX.

SFC proposes to enhance position limit regime

The Securities and Futures Commission (SFC) has launched a public consultation proposing enhancements to the position limit regime to expand its scope and make it more responsive to financial market developments.

Under the proposals, the cap on the excess position limit that may be authorised by the SFC would increase from 50% to 300% of the statutory position limit. The SFC also proposes that the statutory position limit for stock options contracts will triple to 150,000. This is intended to facilitate the implementation of the proposals in Hong Kong Exchanges and Clearing Limited's market consultation on the revision of the stock option position limit model concluded in June 2016.

In addition, new excess position limits are proposed for index arbitrage activities, asset managers and market makers of exchange-traded funds.

Comments on the proposals and the corresponding rule amendments are invited by 21 November 2016.

MPFA revises guidelines on central securities depositories

The Mandatory Provident Fund Schemes Authority (MPFA) has published a revised set of guidelines on central securities depositories. The guidelines have been revised to incorporate changes to Annex A of the guidelines, which contains a list of central securities depositories (CSDs) approved by the MPFA. The MPFA has included in the list of approved CSDs one CSD in Qatar, three CSDs in the United Arab Emirates, and three new CSDs in Austria, Czech Republic and Greece to which the CSD functions of pre-existing approved CSD were transferred.

SFC notifies industry of anti-money laundering concerns

The SFC's Enforcement Division has announced that it is investigating a number of cases of SFC licensed brokerages with suspected inadequate anti-money laundering (AML) internal controls and it expects to bring a number of enforcement proceedings as a result.

The SFC wants to draw to the attention of licensees that they are expected to enhance their AML internal controls immediately and notes that they have had sufficient time to develop their internal controls since the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (AMLO) and the SFC Guideline on Anti-Money Laundering and Counter-Terrorist Financing (Guideline) came into force in 2012.

During its onsite inspections of licensees and AML investigations, the SFC has identified the following areas of concern:

- failure to scrutinise cash and third party deposits into customer accounts;
- ineffective monitoring of transactions in customer accounts;
- failure to take adequate measures to continuously monitor business relationships with customers which present a higher risk of money laundering;
- inadequate enquiries made to assess potentially suspicious transactions to determine whether or not it is necessary to make a report to the Joint Financial Intelligence Unit, and lack of documentation of the assessment results; and
- failure to monitor and supervise the ongoing implementation of anti-money laundering and counter-terrorist financing policies and procedures.

The SFC has emphasised that since licensees are vulnerable to being used to launder the proceeds of crime and to finance terrorism, it relies on them to implement effective AML measures to prevent and detect these criminal activities and expects them to take their AML responsibilities seriously.

CFTC Chairman supports one-year delay for reduction of swap dealer registration threshold

During his keynote remarks at the 4th Annual OTC Derivatives Summit North America, Chairman Massad has expressed his support for a delay in changing the de minimis threshold for swap dealer registration. This threshold determines when an entity's swap dealing activity requires swap dealer registration, which triggers CFTC oversight as well as disclosure, recordkeeping, and documentation requirements. After discussing the findings of a recently issued CFTC staff report regarding this threshold, Chairman Massad announced that he plans to

recommend to his fellow commissioners a one-year extension of the date on which this threshold is scheduled to drop. Unless the CFTC takes action, the current de minimis threshold of USD 8 billion is scheduled to decrease to USD 3 billion in December 2017.

CLIFFORD CHANCE BRIEFINGS

New Local Government Pension Scheme regulations expected to permit investment in derivatives could be made before the end of the year

In November 2015, the Government launched a consultation on proposals to introduce a new approach to the investment strategy in the Local Government Pension Scheme (LGPS) and published the draft Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 for consultation. Of particular interest to those in the investment banking sector is that, if passed as currently drafted, the new regulations will specifically name 'derivatives' as a permitted investment for LGPS funds.

This briefing paper discusses the regulations and when they are likely to be introduced.

https://www.cliffordchance.com/briefings/2016/09/new_local_governmentpensionschemeregulation.html

UK to introduce foreign investment rules for critical infrastructure

The UK Government will significantly reform its approach to the ownership and control of critical infrastructure to ensure that the national security implications of foreign ownership are scrutinised. This will include a review of the public interest regime in the Enterprise Act 2002 and the introduction of a national security requirement for the continuing Government approval of the ownership and control of critical infrastructure.

Following the EU referendum vote, Theresa May suggested that the UK should pass legislation giving the Government greater powers to block or impose conditions on mergers on public interest grounds unrelated to competition. The Government has now announced plans to introduce new foreign ownership rules in the infrastructure sector.

This briefing paper discusses the plans.

https://www.cliffordchance.com/briefings/2016/09/uk_to_introduce_foreigninvestmentrulesfo.html

Market Abuse – private enforcement under MAR?

If you commit market abuse, do other market participants have a private right of action against you? Alternatively, if you believe someone else in the market has committed market abuse, can you bring a claim against them? Until the Market Abuse Regulation (Regulation 596/2014 (MAR)) came into effect on 3 July 2016, the answer in the UK was a certain 'no'. Now, however, the answer is no longer clear-cut.

In Hall v Cable and Wireless PLC [2009] EWHC 1793 (Comm) the English High Court held that there was no private right of action for market abuse. The object of the market abuse regime contained in section 118 Financial Services and Markets Act (FSMA) could be achieved by the imposition of regulatory penalties under section 123 FSMA, or the imposition of restitution orders by the court on the application of the FCA under section 383 FSMA. Given those remedies, and in the absence of an express private right of action in FSMA, it was clear that Parliament had not intended such a right of action to exist.

Market abuse is, however, no longer defined in FSMA, but in Chapter 2 of MAR. Section 118 FSMA has been repealed and sections 123 and 383 FSMA have been amended to take account of MAR. Whilst MAR itself only references enforcement by public bodies, EU law does not preclude private enforcement simply because a regulation does not refer to it. EU regulations may confer rights on individuals which national courts have a duty to protect. In other contexts, claimants have successfully relied on these principles to bring civil claims for breaches of regulations.

This briefing paper discusses the possibility of private enforcement under MAR.

https://www.cliffordchance.com/briefings/2016/09/market_abuse_privateenforcementundermar.html

Walking the tightrope – Hong Kong banks warned not to be heavy-handed in AML checks

The Hong Kong Monetary Authority (HKMA) has warned authorised institutions (AIs) that applying overly stringent anti-money laundering and counter-terrorist financing (AML/CFT) checks when opening and maintaining customer accounts risks excluding legitimate businesses from basic financial services. The HKMA's comments come amid concerns voiced by the city's 29 chambers of commerce about foreign investors not being able to open company bank accounts in Hong Kong.

This briefing paper discusses the HKMA's comments.

https://www.cliffordchance.com/briefings/2016/09/walking_the_tightropehongkongbankswarne.html

The New Normal – Welcome to Delayed Compensation 2.0

After announcing a delay of the 18 July go-live date for the new par/near par delayed compensation regime, the LSTA has now issued an updated version, which went into effect on 1 September. This announcement came after discussions with several market participants, vendors, and settlement platform representatives.

The primary reason for the delay was due to the issue of Buyer 'lead time', which is the LSTA term meaning the time between the date the Agent is ready to close and the date the Buyer can make the funds available. While the July 18 version necessitated having trade documentation executed by T+6, the LSTA Liquidity Committee realized that a T+7 settlement date was virtually impossible. Therefore and moving forward, the requirement is instead to now have all trade documentation executed by T+5. Recognizing the inherent challenge of this requirement, the LSTA has made the decision to implement this new scheme in two consecutive phases.

This briefing paper discusses the new scheme.

https://www.cliffordchance.com/briefings/2016/09/the_new_normal_welcometodelayedcompensatio.html

New York Department of Financial Services Proposes Cybersecurity Regulations

On 13 September 2016, the New York Department of Financial Services (DFS) proposed new and unprecedented regulations establishing minimum cybersecurity regulatory requirements. The proposed regulations demonstrate that cybersecurity continues to be a top priority for the DFS and signal that the DFS intends to vigorously enforce compliance with minimum cybersecurity standards. The proposed regulations would require each entity licensed by the DFS (covered entity) to establish an enhanced cybersecurity program, adopt written cybersecurity policies, and file an annual certification of compliance to be provided by the board of directors or senior officers of each covered entity. The required certification leaves little doubt that the new regulations will soon be an examination and enforcement priority for the DFS.

The proposed regulations are subject to a 45-day notice and public comment period before final issuance. If adopted, the proposed regulations would be effective on 1 January 2017, with a 180-day transitional period during which covered entities would be required to conform to the new regulatory requirements. The first certification would be due in January 2018.

This briefing paper discusses the proposed regulations.

https://www.cliffordchance.com/briefings/2016/09/new_york_departmentoffinancialservice.html